No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL., PETITIONERS

v.

STATE OF NEW YORK, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion and order of the district court (Pet. App. 1a-353a) is reported at 351 F. Supp. 3d 502. A prior opinion of the district court (Pet. App. 354a-436a) is reported at 315 F. Supp. 3d 766. A prior opinion and order of the district court (Pet. App. 437a-451a) is reported at 333 F. Supp. 3d 282. A prior order of the district court (Pet. App. 452a-455a) is not published in the Federal Supplement but is available at 2018 WL 5260467. A prior oral order of the district court (Pet. App. 456a-538a) is unreported.

JURISDICTION

The judgment of the district court was entered on January 15, 2019. The government filed a notice of appeal on January 17, 2019 (Pet. App. 539a). The court of appeals' jurisdiction rests on 28 U.S.C. 1291. The petition for a writ of certiorari before judgment was filed

on January 25, 2019. The petition was granted on February 15, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. The Constitution requires that an "actual Enumeration" of the population be conducted every ten years to apportion Representatives in Congress among the States, and vests Congress with the authority to conduct that census "in such Manner as they shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. The Census Act, 13 U.S.C. 1 *et seq.*, delegates to the Secretary of Commerce the responsibility to conduct the decennial census "in such form and content as he may determine," and "authorize[s] [him] to obtain such other census information as necessary." 13 U.S.C. 141(a).

Exercising that delegated authority, the Secretary of Commerce, Wilbur L. Ross, Jr., made a determination to request citizenship information on the 2020 decennial census questionnaire. Pet. App. 548a-563a. Questions about citizenship or country of birth (or both) were asked of everyone on all but one decennial census from 1820 to 1950, and of a substantial portion of the population on every decennial census (on the so-called "long form" questionnaire) from 1960 through 2000. A citizenship question also has been on the annual American Community Survey (ACS) questionnaire, sent to approximately one in 38 households, since the ACS's inception in 2005. *Id.* at 361a-368a. The decennial census includes many demographic questions, including about

sex, race, Hispanic origin, and relationship status. See *id.* at 26a-27a. Individuals who receive the census questionnaire are required by law to answer fully and truthfully all of the questions, and the government must keep individual answers confidential. 13 U.S.C. 9(a) and 221.

2. The Secretary explained the reasons for reinstating the citizenship question to the decennial census in a March 26, 2018 memorandum. Pet. App. 548a-563a. The Secretary's decision and memorandum responded to a December 12, 2017 letter (Gary Letter) from the Department of Justice (DOJ). *Id.* at 564a-569a. The Gary Letter stated that citizenship data is "critical" to DOJ's enforcement of Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 (Supp. V 2017), that more granular citizenship data "would greatly assist" DOJ, and that "the decennial census questionnaire is the most appropriate vehicle for collecting that data." Pet. App. 565a, 568a; see *id.* at 567a-568a. DOJ thus "formally request[ed] that the Census Bureau reinstate into the 2020 Census a question regarding citizenship." *Id.* at 569a.

Although the Secretary previously had been considering the issue, see Pet. App. 546a, after receiving DOJ's formal request he "initiated a comprehensive review process led by the Census Bureau" that included "legal, program, and policy considerations," *id.* at 548a-549a, and asked the Census Bureau to evaluate the best means of providing the data identified in the letter. The Census Bureau initially presented three alternatives: do nothing; reinstate the citizenship question to the decennial census; or rely solely on federal administrative records to estimate citizenship data in lieu of reinstating the citizenship question. *Id.* at 551a. After reviewing those alternatives, the Secretary asked the Census

Bureau to consider, and he ultimately adopted, a fourth option: reinstating a citizenship question to the decennial census while also using federal administrative records (*i.e.*, a combination of the second and third options). *Id.* at 555a. The Secretary concluded that this option "will provide DOJ with the most complete and accurate [citizenship] data in response to its request." *Id.* at 556a.

The Secretary considered but rejected concerns that reinstating a citizenship question would reduce the response rate for noncitizens. Pet. App. 552a-554a, 556a-559a. While the Secretary agreed that a "significantly lower response rate by non-citizens could reduce the accuracy of the decennial census," *id.* at 552a, he observed that the available evidence, including the Census Bureau's analysis, did not provide "definitive, empirical support" concerning the magnitude of any reduction, *id.* at 554a; see *id.* at 552a-554a (reviewing the available evidence).

Ultimately, the Secretary concluded as a matter of policy that "even if there is some impact on responses, the value of more complete and accurate [citizenship] data derived from surveying the entire population outweighs such concerns." Pet. App. 562a. "The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond." *Ibid.*

3. a. Respondents (plaintiffs below) are governmental entities (including States, cities, and counties) and non-profit organizations. The operative complaints allege that the Secretary's action violates the Enumeration Clause; is arbitrary, capricious, and not in accordance with law under the Administrative Procedure

Act (APA), 5 U.S.C. 701 *et seq.*; and denies equal protection by discriminating against racial minorities. See 18-cv-5025 Compl. ¶¶ 193-212; 18-cv-2921 Second Am. Compl. ¶¶ 178-197.[1] All of the claims rest on the premise that reinstating a citizenship question will reduce the self-response rate to the census because, notwithstanding the legal duty to answer the census, some households associated with noncitizens may be deterred from doing so (and those households will disproportionately contain racial minorities).

Respondents alleged that Secretary Ross's stated reasons in his memorandum are pretextual, and that his decision was driven by secret reasons, including animus against minorities. To prove their claims, respondents asserted that "an exploration of the decision-makers' mental state" was necessary and that extra-record discovery on that issue, including deposition discovery, was thus justified. 18-cv-2921 D. Ct. Doc. 150, at 9 (May 18, 2018). At a July 3, 2018 hearing, the district court granted respondents' request for extra-record discovery. Pet. App. 521a-528a. The court concluded that respondents had made a sufficiently "strong showing of bad faith," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), to warrant extra-record discovery. See Pet. App. 526a.

b. On July 26, 2018, the district court dismissed respondents' Enumeration Clause claims because the

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[1] Challenges to the Secretary's decision also have been brought in district courts in California and Maryland. See *California* v. *Ross*, No. 18-cv-1865 (N.D. Cal. filed Mar. 26, 2018); *Kravitz* v. *United States Dep't of Commerce*, No. 18-cv-1041 (D. Md. filed Apr. 11, 2018); *City of San Jose* v. *Ross*, No. 18-cv-2279 (N.D. Cal. filed Apr. 17, 2018); *La Union Del Pueblo Entero* v. *Ross*, No. 18-cv-1570 (D. Md. filed May 31, 2018). Bench trials have concluded in all of those cases.

"nearly unbroken practice" of Congress's including or authorizing questions about citizenship, along with the "longstanding historical practice of asking demographic questions generally," meant that asking about citizenship "is not an impermissible exercise of the power granted by the Enumeration Clause to Congress." Pet. App. 418a-419a; see *id.* at 408a-424a. The court did not dismiss respondents' APA and equal protection claims, concluding, among other things, that respondents had alleged sufficient facts to demonstrate standing at the motion-to-dismiss stage, *id.* at 371a-391a; the content of the census questionnaire was not committed to the Secretary's discretion by law, *id.* at 398a-408a; and respondents' allegations, accepted as true, stated a plausible claim of intentional discrimination, *id.* at 425a-434a.

c. On August 17, 2018, the district court entered an order compelling the deposition of then-Acting Assistant Attorney General (AAG) for DOJ's Civil Rights Division, John M. Gore, Pet. App. 452a-455a, and on September 21 the court entered an order compelling the deposition of Secretary Ross himself, *id.* at 437a-451a. The court recognized that court-ordered depositions of high-ranking governmental officials are highly disfavored, but nonetheless concluded that "'exceptional circumstances'" existed that "compel[led] the conclusion that a deposition of Secretary Ross is appropriate." *Id.* at 438a-439a (citation omitted). In the court's view, "the intent and credibility of Secretary Ross" were "central" to respondents' claims, and Secretary Ross has "'unique first-hand knowledge'" about his reasons for reinstating a citizenship question that cannot "'be obtained through other, less burdensome or intrusive means.'" *Id.* at 444a, 446a (citation omitted).

4. On October 22, 2018, this Court granted a stay as to the September 21 order compelling Secretary Ross's deposition, to "remain in effect until disposition of" a "petition for a writ of certiorari or a petition for a writ of mandamus." 18A375 slip op. 1. The Court denied a stay as to Acting AAG Gore's deposition and further extra-record discovery into Secretary Ross's mental processes, but did "not preclude the [government] from making arguments with respect to those orders." *Ibid.*

The government filed a petition for a writ of mandamus or, in the alternative, for a writ of certiorari. See 18-557 Pet. On November 16, the Court treated the petition as a petition for a writ of certiorari and granted it, ordering expedited briefing and scheduling oral argument for February 19, 2019. Meanwhile, Acting AAG Gore was deposed on October 26, trial commenced on November 5, and closing arguments were delivered on November 27.

5. On January 15, 2019, the district court issued an opinion and order memorializing its findings of fact and conclusions of law, and entered judgment for respondents. Pet. App. 1a-353a.

a. The district court held that most respondents had Article III standing. Pet. App. 194a-239a. The court concluded that some respondents had associational standing, and that all respondents had standing in their own right, based on four possible theories of injury—diminished political representation; loss of governmental funding; a degradation in the quality of census data; and diversion of resources—all of which are premised on the citizenship question's presence leading to an inaccurate census tally. *Id.* at 200a-225a. But the court rejected respondents' alleged injury from a loss of pri-

vacy, since it rested on "pure speculation" that the government "will not comply with its legal obligations to ensure the privacy of" census responses. *Id.* at 226a.

The district court rejected the government's argument that respondents' purported injuries would not be fairly traceable to the government's decision to reinstate the citizenship question to the decennial census because each would materialize, if at all, only because of the independent, unlawful actions of third parties. Pet. App. 226a-239a.

b. The district court then held that the Secretary's decision was "not in accordance with law," 5 U.S.C. 706(2)(A), because it violates 13 U.S.C. 6(c) and 141(f)(1).

Section 6(c) of the Census Act requires the Secretary to "acquire and use information available from" federal or state administrative records "[t]o the maximum extent possible" "instead of conducting direct inquiries" on the census form, but only if doing so is "consistent with the kind, timeliness, quality and scope of the statistics required." 13 U.S.C. 6(c). The district court found that the Secretary violated subsection (c) because his March 26, 2018 decisional memorandum did not cite the provision. Pet. App. 265a-267a. The court rejected the government's argument that the Secretary in fact considered all of the factors listed in subsection (c) in his memorandum, even though he did not cite the provision. *Id.* at 267a-270a. Instead, the court deemed the Secretary to have "misunderstood his own options" because, in the court's view, reinstating the citizenship question and using federal administrative records "would produce *less accurate citizenship data*" than relying only on the federal administrative records. *Id.* at 269a-270a.

Section 141(f)(1) of the Census Act requires the Secretary to submit a report to Congress containing "the subjects proposed to be included" in the census to the appropriate congressional committees at least three years before the census date. 13 U.S.C. 141(f)(1). Section 141(f)(2) requires a similar report containing "the questions proposed to be included" in the census at least two years before the census date. 13 U.S.C. 141(f)(2). Secretary Ross timely submitted both reports; although the first report did not include citizenship as a "subject" area, the second report did include the proposed citizenship question. See Pet. App. 272a-273a. The district court nevertheless concluded that Secretary Ross violated Section 141(f) by not including citizenship as a "subject" in a report to Congress. The court rejected the government's arguments that the contents of those informational reports are not judicially reviewable and that the Secretary had, in any event, complied with Section 141(f) by identifying citizenship as a question, which necessarily alerted Congress that it was a "subject" too. See *id.* at 276a-283a.

c. The district court further held that the Secretary's decision was arbitrary and capricious because the Secretary's reasons contradicted the available evidence, the Secretary overlooked important aspects of the problem, and the Secretary departed from standard Census Bureau procedures. Pet. App. 284a-311a. Although the court purported to base its findings solely on evidence in the administrative record, it also purported to bolster its findings based on extra-record evidence. *Id.* at 260a-261a.

According to the district court, the "most significant" contradiction between the Secretary's decision and the evidence was that "adding a citizenship question

to the census will result in *less* accurate and *less* complete citizenship data." Pet. App. 289a-290a. The court also listed some supposed inaccuracies in the Secretary's memorandum, see *id.* at 286a-289a; for example, the Secretary said that adding the question would be "no additional imposition" for millions of households containing citizens or lawful immigrants, even though, in the court's view, "common sense" dictates that adding the question would impose "an additional burden—one question's worth, per person, per household—on every respondent." *Id.* at 286a-287a.

The district court also found that the Secretary failed to consider "important aspects of the problem," Pet. App. 294a (brackets and citation omitted), including: "whether it was necessary to respond to DOJ's request at all," *ibid.*; whether "more granular [citizenship] data is 'necessary' for enforcement of the VRA," *id.* at 295a; and whether "the Census Bureau's confidentiality obligations [under 13 U.S.C. 9(a)] and disclosure avoidance practices" would prevent use of census citizenship data for DOJ's purposes, *id.* at 297a.

In the district court's view, the Secretary also had failed to comply with various statistical quality standards, including OMB Statistical Policy Directive Number 2, which requires the Census Bureau to "'design and administer' the census 'in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost.'" Pet. App. 304a (citation omitted). According to the court, the Secretary's decision to use *both* administrative records *and* a decennial census question to gather citizenship data, instead of

administrative records alone, was not the "best" balance of benefits and costs. *Id.* at 303a (citation omitted); see *id.* at 302a-305a.

d. The district court also found "clear that Secretary Ross's rationale was pretextual" and thus not the "real reason for his decision," Pet. App. 311a, because the Secretary had "made the decision to add the citizenship question well before he received DOJ's request and for reasons unrelated to the VRA," *id.* at 313a. In the court's view, the mere fact that the Secretary had additional reasons for his actions, or had begun to consider reinstating the citizenship question before DOJ's formal request, was sufficient to "vacat[e] and set[] aside his decision." *Ibid.* The court further found that the Secretary was "'unwilling or unable to rationally consider' arguments against the question after he received DOJ's request," *id.* at 318a (citation omitted), and that "there is no basis in the record to conclude that Secretary Ross 'actually believed' the [VRA-enforcement] rationale he put forward," *id.* at 320 (brackets and citation omitted).

e. The district court rejected respondents' equal-protection claim, finding they had not proved any discriminatory animus on the Secretary's part. Pet. App. 331a-334a.

f. As a remedy, the district court vacated the Secretary's decision to reinstate the citizenship question to the 2020 decennial census and remanded to the agency. The court also enjoined the Secretary "from adding a citizenship question to the 2020 census questionnaire based on Secretary Ross's March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum."

Pet. App. 346a. Finally, the court vacated its September 21, 2018 order compelling the deposition of Secretary Ross as moot. *Id.* at 353a. Respondents later withdrew their notice of the Secretary's deposition. 18-cv-2921 D. Ct. Doc. 577 (Jan. 24, 2019).

6. After the district court entered a final judgment, respondents moved this Court to dismiss the writ of certiorari in No. 18-557 as improvidently granted. The Court removed the case from the February argument calendar and suspended the briefing schedule pending further order.

SUMMARY OF ARGUMENT

The district court erred in enjoining the Secretary from reinstating to the decennial census a wholly unremarkable demographic question about citizenship, which has been asked in one form or another for nearly 200 years. The court compounded its error by permitting respondents to stray outside the administrative record to challenge the Secretary's decision.

I. A. Respondents lack Article III standing because their asserted injuries are not fairly traceable to the Secretary's decision to reinstate the citizenship question to the decennial census. None of respondents' alleged injuries will materialize if individuals completely and truthfully answer the census questionnaire, as required by federal law. The alleged injuries thus depend not just on third-party action, but on third-party action that is unlawful. Even worse, the unlawful third-party action is driven solely by speculative fears that the government itself will act unlawfully by using answers to the citizenship question for law-enforcement purposes. This Court has never endorsed such a capacious theory of standing, based on future illegal third-party conduct prompted by speculative fears of future

illegal governmental conduct. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

B. The Secretary's decision to reinstate the citizenship question "is committed to agency discretion by law" and thus judicially unreviewable. 5 U.S.C. 701(a)(2). The Constitution "vests Congress with virtually unlimited discretion in conducting" the decennial census, and Congress in turn "has delegated its constitutional authority over the census" to the Secretary. *Wisconsin* v. *City of New York*, 517 U.S. 1, 19, 23 (1996). The Census Act simply directs the Secretary to "take a decennial census * * * in such form and content as he may determine," 13 U.S.C. 141(a), and thus vests the Secretary with the same broad discretion that the Constitution confers on Congress. As a result, the statute provides "no meaningful standard against which to judge the agency's exercise of discretion," *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (citation omitted). Also, a decision about what demographic questions to ask on the decennial census necessarily entails a "complicated balancing of a number of factors," underscoring its "general unsuitability for judicial review." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Although the district court purported to find support for its contrary conclusion in a handful of lower-court cases, none of them involved challenges to the contents of the census form.

C. The district court erred in finding the Secretary's decision arbitrary and capricious under the APA. 5 U.S.C. 706(2)(A). Arbitrary-and-capricious review is both narrow and deferential, requiring only a "rational" explanation for agency action. *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Secretary easily passed that standard here. Citizenship and other demographic

questions have long been a part of the decennial census despite their potential effect on response rates. And the Secretary set forth his reasons for reinstating the citizenship question in a detailed decisional memorandum, in which he evaluated four potential options for satisfying DOJ's request for citizenship data. See Pet. App. 548a-563a. He expressly acknowledged the very concerns respondents raise here, but made the policy judgment that "the value of more complete and accurate" citizenship data "outweighs such concerns." *Id.* at 562a.

Instead of evaluating that policy judgment through the deferential lens required by the APA, the district court improperly "substitute[d] its judgment for that of the agency." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). The court's "most significant" reason for overruling the Secretary's policy choice was its conclusion that citizenship data in federal administrative records is somehow *more* complete and accurate than that same data *plus* data from the census. Pet. App. 289a. That illogical conclusion is belied by the very evidence the court relied on, which showed that asking the citizenship question would yield the citizenship information of tens of millions of individuals for whom the Bureau is currently missing data. See *id.* at 55a-56a.

The district court likewise erred in concluding that the Secretary failed to consider important aspects of the problem, including whether more granular citizenship data is necessary for VRA enforcement. DOJ explained why it needed such data, and it was not arbitrary and capricious for the Secretary to rely on that explanation. Cf. *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007). The court similarly erred in concluding that the Secretary

violated various statistical directives and standards, in part because they do not bind the Secretary.

D. The district court further erred in finding the Secretary's stated rationale pretextual. As long as an agency's contemporaneous explanation for its action is "rational," *State Farm*, 463 U.S. at 43 (citation omitted), it does not matter if the decisionmaker had other reasons for making the decision. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014). The district court thought these principles inapplicable here because of the existence of "improper 'external political pressures,'" Pet. App. 320a (citation omitted), but an agency decisionmaker's communicating with external stakeholders is perfectly commonplace and not a reason to set aside agency action under the APA. *Sierra Club* v. *Costle*, 657 F.2d 298, 408-410 (D.C. Cir. 1981). And nothing in the record supports the district court's extraordinary charge that the Secretary of Commerce lied to Congress, the judiciary, and the public. Even to find mere inconsistencies, the court strained to read every statement and action of the Secretary in the worst possible light, contrary to the longstanding presumption of regularity that attaches to Executive Branch action. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

E. The district court further erred in concluding that the Secretary's decision was "not in accordance with law." 5 U.S.C. 706(2)(A). Section 6(c) of the Census Act requires a policy-laden judgment about when administrative records cannot provide data of the "kind, timeliness, quality and scope of the statistics required," 13 U.S.C. 6(c), which is not a judicially manageable standard. Regardless, the Secretary did not violate

Section 6(c): even if used "[t]o the maximum extent possible," *ibid.*, federal administrative records are missing citizenship information for some 35 million people, which is why the Secretary chose to supplement that incomplete data with census data. And if the Secretary's informational reports under Section 141(f) are deficient, that is a matter for Congress to address, not the courts. See *Natural Res. Def. Council, Inc.* v. *Hodel*, 865 F.2d 288, 318-319 (D.C. Cir. 1988). In any event, the Secretary complied with Section 141(f) by expressly including the citizenship question in his report under Section 141(f)(2), which necessarily alerted Congress that citizenship is now also a "subject" covered by the census questionnaire.

F. The district court properly rejected respondents' enumeration and equal-protection claims, so neither provides an alternative ground for affirmance. Demographic questions have a long tradition on the decennial census despite not being strictly necessary to conduct an "enumeration." And respondents failed to produce any evidence that the Secretary harbored discriminatory animus.

II. The district court also erred in allowing respondents to seek, and in relying in part on, evidence outside the administrative record. Although courts may stray outside the administrative record when there is "a strong showing of bad faith or improper behavior" on the part of the agency decisionmaker, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), respondents did not make that showing here. The court's contrary conclusion was based on precisely the same circumstances it used to bolster its erroneous findings that the Secretary's decision was arbitrary and

capricious and pretextual. Accordingly, they fail for the same reasons.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENJOINING THE SECRETARY FROM REINSTATING THE CITIZENSHIP QUESTION TO THE 2020 DECENNIAL CENSUS

A. Respondents Lack Article III Standing

Under the familiar test for Article III standing, respondents must establish, among other things, that their alleged injuries "fairly can be traced," *i.e.*, are "fairly attributable," to the Secretary's decision to reinstate the citizenship question to the decennial census. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41, 44 (1976). The district court found that respondents had alleged four cognizable injuries: diminishment of political representation, loss of government funding, harm to the accuracy of census data, and diversion of resources. See Pet. App. 200a-219a. But these injuries, even if otherwise cognizable, will not occur if everyone who receives the census form fully and truthfully fills it out. Rather, the alleged injuries will materialize only if, in light of the citizenship question's mere presence, significant numbers of people refuse to return the census form or falsely underreport the number of people in their households. Yet that result would be "fairly attributable" only to the actions of individuals who unlawfully refuse to truthfully and completely fill out and return the census form, see 13 U.S.C. 221(a), and who then are able to evade the government's extensive follow-up efforts, see Pet. App. 19a-20a. Respondents' alleged injuries would thus be "the result of the independent action of some third party not before the court" and therefore insufficient to support standing. *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997).

This Court has repeatedly "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). That reluctance should apply with even more force when, as here, the independent third-party actions are *unlawful*. Cf. *Spencer* v. *Kemna*, 523 U.S. 1, 15 (1998) (no standing to pursue a claim "contingent upon respondents' violating the law" in the future). To be sure, a third party's action injuring a plaintiff can support standing if the defendant's conduct had a "determinative or coercive effect upon th[at] action." *Bennett*, 520 U.S. at 169; see, *e.g.*, *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 64 n.6 (1963) (prohibition on distribution of books deemed obscene supported standing of book publishers whose sales would suffer). But the citizenship question's presence does not coerce anyone into declining to respond to the census questionnaire. Quite the contrary: the government coerces residents under pain of criminal penalty to fully and truthfully answer the decennial census questionnaire. 13 U.S.C. 221.

Moreover, respondents' standing necessarily depends not only on unlawful third-party action, but on speculation that the government, too, will act unlawfully. Under respondents' theory, the only evident reason third parties might illegally refuse to completely and truthfully respond to the census is that households containing illegal aliens may fear that the government will use their answers against them for law-enforcement purposes. But it is illegal for the Census Bureau to reveal an individual's answers to other governmental agencies to use for such purposes, 13 U.S.C. 9, and any governmental employee who does so may be fined or imprisoned, 13 U.S.C. 214. This Court has never found

Article III standing when the alleged injury arises from speculative fears that a governmental agency or its personnel will violate the law in the future. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983). Even the district court recognized that it was "pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data." Pet. App. 226a. Accordingly, the court correctly determined that such speculation was insufficient to support standing based on residents' potential "loss of privacy" from having to answer the citizenship question. *Ibid.*

That logic applies with equal force to all of respondents' alleged injuries, which would not materialize but for third parties' speculative fears of unlawful government action (thereby leading them to act unlawfully in response). A plaintiff who "is not himself the object of the governmental action or inaction he challenges" should find it "'substantially *more* difficult' to establish" standing, not less. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasis added; citations omitted); *Eastern Ky. Welfare Rights Org.*, 426 U.S. at 44-45 ("indirectness of injury" generally "'make[s] it substantially more difficult'" to establish standing) (citation omitted). Turning this rule on its head, the district court held that even though third parties' "pure[ly] speculat[ive]" fears of governmental misconduct are insufficient to support their own standing, Pet. App. 226a, their unlawful actions based on those speculative fears are somehow sufficient to manufacture standing for respondents.

The district court's expansive theory of standing cannot be cabined: on the court's logic, respondents would have standing to challenge the inclusion of any

demographic question on the decennial census as long as they could plausibly allege that residents will illegally refuse to answer the question—no matter the reason. If, for example, a group advocating a race-blind government boycotted the census because of the questions concerning race and Hispanic origin, any resulting undercount would (on this expansive theory) be deemed fairly traceable to the government's inclusion of the questions, rather than to the third parties' independent, unlawful decision to boycott. This Court's cases do not permit that result. See *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003) (plaintiffs lacked standing to challenge a statute permitting increased campaign contributions because plaintiffs' "alleged inability to compete stems not from the operation of [the statute], but from their own personal 'wish' not to solicit or accept large contributions, *i.e.*, their personal choice").

The circuit-court cases on which the district court relied (Pet. App. 236a-237a) are inapposite, as they involve challenges either to the defendant's failure to protect the plaintiff from harm in contravention of a duty to protect, see, *e.g.*, *Natural Res. Def. Council* v. *National Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018) (agency allegedly failed to impose the penalties prescribed by Congress for violating certain regulations); *Attias* v. *CareFirst Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017) (insurance company allegedly did not encrypt or secure personal information, leading to a data breach), cert. denied, 138 S. Ct. 891 (2018); *Lambert* v. *Hartman*, 517 F.3d 433 (6th Cir. 2008) (county clerk allegedly unlawfully published plaintiff's Social Security number on a public website), cert. denied, 555 U.S. 1126 (2009), or to actions that actively facili-

tated third parties' unlawful conduct, see, *e.g.*, *Rothstein* v. *UBS AG*, 708 F.3d 82, 93 (2d Cir. 2013) (bank allegedly provided financial services to terrorist groups). None supports the claim that harm resulting from unlawful third-party conduct, itself driven by speculative fears that the government will act unlawfully, is fairly attributable to the government's otherwise lawful actions.

B. The Content Of The Census Questionnaire Is Committed To Agency Discretion By Law

Even setting aside Article III standing, the Secretary's decision about what questions to include on the decennial census questionnaire is not subject to judicial review under the APA.

1. The APA bars judicial review of any action that "is committed to agency discretion by law." 5 U.S.C. 701(a)(2). Action is committed to agency discretion by law when the governing "statutes are drawn in such broad terms that in a given case there is no law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971) (citation omitted), and thus "a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)).

That perfectly describes this case. The Constitution "vests Congress with virtually unlimited discretion in conducting" the decennial census, and Congress in turn "has delegated its constitutional authority over the census" to the Secretary. *Wisconsin* v. *City of New York*, 517 U.S. 1, 19, 23 (1996). The Secretary thus possesses the same broad discretion that the Constitution confers on Congress. *Ibid.* And neither the Constitution nor the Census Act provides any standard by which to judge

the lawfulness of including (or excluding) a given question on the census form. To the contrary, the Constitution simply instructs Congress to conduct the census "in such Manner as they shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. And the statute in turn directs the Secretary to "take a decennial census * * * in such form and content as he may determine." 13 U.S.C. 141(a). Neither contains any "meaningful standard" to guide the Secretary's determination. *Webster*, 486 U.S. at 600.

Indeed, the Census Act expressly confers on the Secretary the discretion not just to count the population but to "obtain such other census information as necessary." 13 U.S.C. 141(a). In this context, "necessary" is properly interpreted as "convenient" or "useful," not "absolutely necessary." See *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 418-419 (1992). Any other definition would preclude the asking of *any* demographic question on the decennial census—contrary to the venerable and unbroken tradition of asking such questions. And Congress has consistently refused to constrict the Secretary's discretion to ask demographic questions on the decennial census. Indeed, Section 141(a) itself was enacted to provide "*greater* discretion" to ask such questions on the census, including on "subjects of current national concerns." H.R. Rep. No. 246, 93d Cong., 1st Sess. 14 (1973) (emphasis added). And even when Congress wished to protect the privacy of individuals' religious beliefs and affiliations, it did so by removing the obligation to answer such questions on the census, 13 U.S.C. 221(c)—not by curtailing the Secretary's discretion to ask them.

The Secretary's discretion is thus at least as broad as that granted by the statute at issue in *Webster*, which

allowed the Director of the CIA to terminate an employee whenever the Director "'shall deem such termination necessary or advisable in the interests of the United States,'" and which this Court concluded "foreclose[d] the application of any meaningful judicial standard of review." 486 U.S. at 600 (citation and emphasis omitted); see *Senate of State of Cal.* v. *Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992) (Census Act's "grant of authority to the Secretary does fairly exude deference"). As the Seventh Circuit has observed, so "nondirective" are the Constitution, the Census Act, and the APA "about how to conduct a census * * * that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." *Tucker* v. *United States Dep't of Commerce*, 958 F.2d 1411, 1417-1418 (1992).

The text and history of the Census Act confirm that review of the contents of the decennial census questionnaire lies with Congress, not the judiciary. The Secretary must report the planned subjects and questions on the decennial census to Congress at specified deadlines, see 13 U.S.C. 141(f), and the Secretary routinely testifies before House and Senate committees about the decennial census, see, *e.g.*, Pet. App. 71a-73a; 18-557 Gov't Br. at 25-31 (discussing Secretary Ross's testimony to various congressional committees about the citizenship question's inclusion on the 2020 decennial census). Demographic questions, including ones about sensitive topics such as race, gender, marital status, and citizenship, long have appeared on the decennial census questionnaire. See Pet. App. 15a-19a. Yet until now no court has seen fit to police the contents of the decennial census questionnaire by even entertaining an arbitrary-

and-capricious challenge, let alone upholding one. Cf. *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (a "tradition of nonreviewability" counsels against APA reviewability). The absence of such suits, combined with a long history of active congressional oversight, confirms that the "virtually unlimited discretion in conducting" the decennial census belongs to the political branches, not the courts. *Wisconsin*, 517 U.S. at 19.

Finally, that this discretion would rest solely with the political branches makes eminent sense, for deciding what questions to ask on the decennial census necessarily involves a "complicated balancing of a number of factors," making it "unsuitab[le]" for judicial review under the APA. *Chaney*, 470 U.S. at 831. At the margins, each additional question on the decennial census yields additional useful information in exchange for potentially lower response rates and concomitantly higher follow-up costs. Deciding whether the benefits outweigh the costs is fundamentally a policy judgment—one that Secretary Ross expressly made here. Pet. App. 562a. Congress entrusted such judgments to the Secretary's discretion, with any review to be conducted by Congress itself. 13 U.S.C. 141(a) and (f). The Secretary's policy judgment to reinstate the citizenship question to the 2020 decennial census is thus precisely the sort of decision that the APA makes immune from judicial second-guessing. 5 U.S.C. 701(a)(2); *Chaney*, 470 U.S. at 831; *Tucker*, 958 F.2d at 1417 (stating that the Constitution, Census Act, and APA "do not create justiciable rights" because they provide no "judicially administrable standard" for determining "how to conduct a census").

2. The district court gave four reasons in support of its contrary conclusion. See Pet. App. 400a-408a. None has merit.

First, the district court asserted (Pet. App. 400a-401a) that *Carey* v. *Klutznick*, 637 F.2d 834 (2d Cir. 1980) (per curiam), permits APA review. But *Carey*—which predates this Court's decisions in *Chaney*, *Brotherhood of Locomotive Engineers*, and *Webster*—concerned a challenge to the methods used by the Census Bureau to count residents in low-income areas. *Id.* at 836. It did not involve a challenge to the content of the census questionnaire. Accordingly, the court had no occasion to address the application of Section 141(a)'s broad grant of authority to the Secretary's determination of the "form and content" of the census questionnaire, including the collection of any additional information he finds "necessary."

Second, the district court invoked (Pet. App. 402a-403a) several provisions of the Census Act that it believed impose "mandatory duties" on the Secretary: 13 U.S.C. 5 and 141(a), (b), and (c). But none imposes any duties with respect to the content of the census questionnaire. Section 5 states that the Secretary "shall prepare questionnaires, and shall determine the inquiries, and the number, form and subdivisions thereof." 13 U.S.C. 5. Far from constraining the Secretary's discretion, Section 5 in fact reinforces the conclusion that the Secretary's decisions concerning the content of the questionnaire are judicially unreviewable. The same is true of Section 141(a), as discussed above. And Section 141(b) and (c) merely set deadlines for the Secretary to report the population count to the President and to provide certain information to States. Neither imposes any restrictions on the content of the census questionnaire.

If anything, all of these provisions only underscore that Congress knows how to impose limitations on the Secretary's conduct of the census—yet deliberately chose *not* to impose in Section 141(a) any limitations on the content of the census questionnaire.

Third, the district court relied (Pet. App. 403a-405a) on Justice Stevens's concurring opinion in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992). *Franklin* involved a challenge to the method by which overseas governmental employees were allocated to States for apportionment purposes. *Id.* at 795 (majority opinion). A plurality stated that "[c]onstitutional challenges to *apportionment* are justiciable," *id.* at 801 (emphasis added), but the Court had no occasion to resolve whether the APA permitted judicial review of the Secretary's taking of the census itself. Justice Stevens's separate opinion, which was not controlling, surmised that the APA might permit such review because the taking of the census does not implicate national-security concerns. See *id.* at 818-819 (concurring in part and in the judgment). The concurrence did not provide any basis in the APA for drawing such a distinction, and in any event rested on the mistaken premise that "[n]o language equivalent to 'deem . . . advisable' [as in the statute at issue in *Webster*] exists in the census statute," and thus the Secretary does not have the same sort of discretion as the CIA Director did in *Webster*. *Id.* at 817. Four years later, however, a majority of the Court effectively rejected that view in *Wisconsin*, recognizing that the Census Act grants "virtually unlimited discretion" to the Secretary. 517 U.S. at 19.

Fourth, and again relying heavily on the concurrence in *Franklin*, the district court concluded (Pet. App. 405a) that "there are in fact judicially manageable

standards with which courts can review the Secretary's decisions" because of the existence of case law entertaining various census-related challenges. See *id.* at 405a-406a (citing cases). But just because *other* Census Act provisions supply judicially manageable standards does not mean that Section 141(a), the provision at issue here, does. For example, Section 195, which prohibits the use of "sampling" for "the determination of population for purposes of apportionment," 13 U.S.C. 195, is judicially enforceable because a court can determine whether the Secretary has or has not engaged in impermissible sampling. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 335 (1999). By contrast, neither the Census Act nor the Constitution provides any standard to guide a court's judgment of when the Secretary has exceeded his authority to take the decennial census "in such form and content as *he* may determine." 13 U.S.C. 141(a) (emphasis added).

Tellingly, none of the cases the district court cited (Pet. App. 405a-406a) involved challenges to the Secretary's determination of the "form" or "content" of the decennial census questionnaire under Section 141(a). Two of the cases, *Philadelphia* v. *Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980), and *Utah* v. *Evans*, 182 F. Supp. 2d 1165 (D. Utah 2001), aff'd, 536 U.S. 452 (2002), involved sampling. And the other two, *City of Willacoochee* v. *Baldrige*, 556 F. Supp. 551 (S.D. Ga. 1983), and *Texas* v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992), involved challenges to the *accuracy* of the census tabulation. As noted above, such challenges generally are not judicially reviewable because there is no standard by which a court could determine how accurate is accurate enough, see *Tucker*, 958 F.2d at 1417-1418; and in any

event, this case does not involve such a challenge. In short, none of the cited cases stands for the proposition that Section 141(a) provides a judicially manageable standard to review the Secretary's "virtually unlimited discretion" to determine the contents of the census form. *Wisconsin*, 517 U.S. at 19.

C. The Secretary's Decision Was Not Arbitrary And Capricious

Even if the Secretary's decision were reviewable, the district court erred in concluding (Pet. App. 284a-311a) that the decision was arbitrary and capricious. 5 U.S.C. 706(2)(A).

1. The "scope of review under the 'arbitrary and capricious' standard is narrow." *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Under "this 'narrow' standard of review," an agency need only "'examine the relevant data and articulate a satisfactory explanation for its action.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted). And review of that explanation is "deferential." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007). That is particularly true here, given the "virtually unlimited discretion" the Constitution grants to Congress, and Congress in turn has granted to the Secretary, to conduct the decennial census. *Wisconsin*, 517 U.S. at 19.

At the threshold, it simply cannot be arbitrary and capricious—or "irrational," as the district court put it, Pet. App. 285a n.65—to reinstate to the decennial census a question whose pedigree dates back nearly 200 years. Indeed, 2010 was the first time in 170 years that

a question about citizenship or birthplace did *not* appear on any decennial census form. As the Secretary observed, "other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few." *Id.* at 561a. The United Nations also recommends asking about citizenship on a census. *Ibid.* And the United States itself continues to ask about citizenship on the ACS, as it has since the ACS's inception. More generally, the decennial census has always included demographic questions notwithstanding their potential impact on response rates, see *id.* at 16a-19a, including dozens of questions on the long form, which had measurably lower response rates, see *id.* at 553a. In light of the longstanding, uniform, and widely accepted practice of asking demographic questions in general and a citizenship question in particular, the Secretary's decision to reinstate a citizenship question to the decennial census can hardly be "irrational" under any standard of review.

That conclusion is all the more obvious under the narrow and deferential standard of review that applies to agency action. Under that standard, an agency need only "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted). Even if that explanation is "of less than ideal clarity," courts must uphold the agency's decision as long as "the agency's path may reasonably be discerned." *Ibid.* (citation omitted); see *Home Builders*, 551 U.S. at 658.

Here, the Secretary explained in his decisional memorandum (Pet. App. 548a-563a) that he had received a

formal request from DOJ to provide more granular citizenship data for VRA enforcement purposes; he evaluated the advantages and disadvantages of three options that Census Bureau personnel offered; he asked the Bureau to analyze a fourth option; and this fourth option—using citizenship data from federal administrative records *and* reinstating the citizenship question to the decennial census—"will provide DOJ with the most complete and accurate [citizenship] data in response to its request." *Id.* at 556a. That explanation was of more than sufficient clarity to reasonably discern the rationale on which the Secretary chose to rest his decision. *Home Builders*, 551 U.S. at 658.

Nor did the Secretary overlook the potential downsides of reinstating the citizenship question to the decennial census. The Secretary expressly acknowledged the risk that reinstating the question would depress response rates and increase the costs of follow-up operations. Pet. App. 552a-554a, 556a-561a. Yet he also observed that "limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially." *Id.* at 557a. Undertaking a "comparative analysis" between response rates to the ACS (which has always included a citizenship question) and the census is "challenging" because the ACS is so much longer than the census questionnaire. *Id.* at 553a. Even looking at the ACS alone, differential nonresponse rates to the citizenship question are "comparable to nonresponse rates for other questions." *Ibid.* And a comparison of the relative response rates to the 2000 decennial census "short form" (which did not include a citizenship question) and long form (which did) was inconclusive. *Id.* at 554a. In sum, the existing data simply "did not provide definitive, empirical support for

th[e] belief" that "adding a citizenship question could reduce response rates." *Ibid.* That was particularly so, the Secretary concluded, for individuals "who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement," as they would be unlikely to answer the census "regardless of whether [it] includes a citizenship question." *Id.* at 557a.

All that said, the Secretary concluded that "even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." Pet. App. 562a. "The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond." *Ibid.* That policy-laden balancing was a quintessential exercise of the Secretary's "virtually unlimited discretion" to conduct the census, *Wisconsin*, 517 U.S. at 19, and plainly was "the product of reasoned decisionmaking," *State Farm*, 463 U.S. at 52.

2. In concluding otherwise, the district court improperly "substitute[d] its judgment for that of the agency." *Fox Television*, 556 U.S. at 513 (citation omitted).

a. The district court found "most significant" the fact that "Secretary Ross's own stated 'priority' was to 'obtain *complete and accurate data*'" on citizenship. Pet. App. 289a (brackets and citation omitted). Importantly, the court did not purport either to question this priority or to hold that the Secretary's decision to pursue it (even at the cost of a lower self-response rate) would be arbitrary and capricious. Instead, the court attacked the premise, concluding that "all of the

relevant evidence before Secretary Ross—*all* of it—demonstrated that using administrative records" alone "would actually produce more accurate" citizenship data than *both* using administrative records *and* asking a citizenship question, as Secretary Ross chose to do. *Id.* at 290a. That conclusion not only defies logic, but betrays the court's fundamental misunderstanding of the evidence before the Secretary—principally, a handful of internal pre-decisional memoranda from the Census Bureau to the Secretary, J.A. 104-159, on which the court "relie[d] heavily," Pet. App. 285a n.65; see *id.* at 290a-293a; see also *id.* at 54a-58a (summarizing some of these materials). Those memoranda make clear that adding the citizenship question would, as the Secretary concluded, yield more accurate and complete citizenship data for the United States population.

According to those memoranda, citizenship information for approximately 295 million people is currently available in federal administrative records, so without a census citizenship question, the Bureau would have to "model" or impute citizenship information for some 35 million people. See Pet. App. 55a; cf. *Utah* v. *Evans*, 536 U.S. 452, 457-458 (2002) (describing older methods of imputation). With the question, the Bureau estimates that the number of people whose citizenship information cannot be "linked" to federal administrative records would increase from 35 million to 36 million, largely because some people will not return the form or not fill out the citizenship question. Pet. App. 55a-56a; see J.A. 146-147. That is why the district court concluded that citizenship data in federal administrative records alone would be more complete and accurate. See *ibid.*; *id.* at 290a-292a.

But the district court ignored evidence in those memoranda describing the advantages of reinstating the citizenship question—principally, the fact that hundreds of millions of people will answer the citizenship question, including some *22 million people* for whom citizenship information would otherwise be unavailable. See Pet. App. 55a-56a; J.A. 145-150. That means the number of people for whom the Bureau would need to "model" citizenship information would reduce from 35 million to 13.8 million—an obvious improvement in data completeness and quality. Pet. App. 55a-56a. And adding the citizenship question would concomitantly increase the number of individuals for whom the government has *actual* (not modeled or imputed) citizenship information from 295 million to roughly 316 million—another clear benefit. See *ibid.* Moreover, that larger figure includes roughly 272 million people whose citizenship data is linked to administrative records, see *id.* at 56a, thereby providing valuable "compar[ison]" data that the Bureau can use to improve the quality of imputation "for that small percentage of cases where [imputation] is necessary," *id.* at 556a. The court overlooked this additional benefit, too.

The district court noted that of the 22 million additional responses, "just under 500,000" (or roughly 2%) will be inaccurate. Pet. App. 56a. The court inexplicably deemed this a "high rate" of error. *Ibid.* But whether it is high or low is beside the point: the Secretary acknowledged that errors would exist, see *id.* at 555a, but judged the benefits to outweigh the costs, see *id.* at 562a. The court's rejecting that conclusion because the error rate would (in its view) be too "high" is a classic case of "substitut[ing] its judgment for that of

the agency." *Fox Television*, 556 U.S. at 513 (citation omitted).

So too the district court's observation that 9.5 million responses to the citizenship question will conflict with data in administrative records. Pet. App. 56a. If the administrative records truly are more accurate than self-responses, nothing prevents the Census Bureau, in the event of such conflicts, from providing DOJ the data in those records instead of the self-response data. Regardless, that is a decision about what to do with census data that already has been collected—not a reason to prohibit asking the citizenship question in the first place. In giving dispositive weight to these estimated 9.5 million records, the court once again "substitute[d] its judgment for that of the agency." *Fox Television*, 556 U.S. at 513 (citation omitted).

To be sure, Census Bureau personnel also believed that using administrative records alone would be preferable because the modeling or imputation process (for those individuals for whom citizenship data is missing) will in the aggregate be less accurate if the citizenship question is asked. See Pet. App. 291a, 319a. Yet if the citizenship question is asked, imputation will be required for substantially fewer people—13.8 million instead of 35 million. See *id.* at 55a-56a. Whether to prefer an option that requires substantially less imputation over one that requires substantially more (albeit higher-quality) imputation is ultimately a policy choice—one that is left to the Secretary's discretion. And as this Court has emphasized—in the context of the census, no less—"that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision." *Wisconsin*, 517 U.S.

at 23. At a minimum, given the lack of definitive empirical data on the issue, it was not arbitrary and capricious for the Secretary to reject the pessimistic views of the Bureau (and of the district court) and instead make the policy judgment that obtaining more complete and accurate citizenship data "is of greater importance than any adverse effect that may result from people violating their legal duty to respond" to the census. Pet. App. 562a.

The district court's remaining criticisms lack force. The court disputed the Secretary's statements that the citizenship question would be "no additional imposition" on most people; that placing the question last on the questionnaire would "minimize any impact" on response rates; and that it was "difficult to assess" the cost of increased follow-up procedures. Pet. App. 286a-289a (citations omitted). These are insubstantial quibbles. Nothing in the record indicates that a single additional question will substantially burden census respondents, and logic dictates that placing a question last will minimize (even if not eliminate) the risk that individuals will refuse to fill out the questionnaire altogether. And although the Secretary found questionable the Bureau's estimate of follow-up costs, he concluded that "even assuming that estimate is correct," it was within the margin of error of the allocated budget and thus not of significant concern. *Id.* at 561a. None of these conclusions is incorrect; and in any event all of them easily satisfy the narrow and deferential "arbitrary and capricious" standard of review under the APA, especially given the exceptionally broad discretion the Secretary wields over the census. *Wisconsin*, 517 U.S. at 19; *State Farm*, 463 U.S. at 43.

b. The district court likewise erred in concluding (Pet. App. 294a-300a) that the Secretary failed to consider important aspects of the problem.

The district court first criticized the Secretary for failing to consider "whether it was necessary to respond to DOJ's request at all." Pet. App. 294a. But a Cabinet Secretary does not lightly ignore a formal request from another department. And it is hardly unusual for one department to rely on the expertise of the other. See, *e.g.*, *City of Tacoma* v. *FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006); cf. *Home Builders*, 551 U.S. at 662; *Massachusetts* v. *EPA*, 549 U.S. 497, 530 (2007); *Bennett*, 520 U.S. at 169-170. It cannot possibly be arbitrary and capricious for a Cabinet Secretary to pay respectful attention to such formal requests.

The district court also criticized the Secretary for failing to consider whether "more granular [citizenship] data is 'necessary' for [VRA] enforcement." Pet. App. 295a. Yet DOJ provided four reasons why more granular citizenship data from the census would aid its VRA enforcement efforts, including that the currently available data from the ACS did not align in time or scope with the census population data used for redistricting efforts. *Id.* at 567a-568a. The Secretary was entitled to rely on DOJ's analysis; for under the APA, "the critical question is whether the action agency's *reliance* was arbitrary and capricious, not whether the [other agency's analysis] is somehow flawed." *City of Tacoma*, 460 F.3d at 75. Yet the district court did not directly address any of DOJ's reasons in its own analysis, let alone explain why they were so flawed that it was arbitrary and capricious to rely on them. See Pet. App. 295a-297a. Nor did the court even acknowledge the many submissions

of States confirming that citizenship data from the census would be useful for their own VRA and redistricting efforts. See, *e.g.*, Administrative Record (AR) 1079-1080 (Louisiana), 1155-1157 (Texas), 1161-1162 (Alabama), 1210-1212 (Oklahoma, Kansas, Michigan, Indiana, Nebraska, South Carolina, Arkansas, Georgia, Kentucky, Tennessee, Mississippi, Florida, and West Virginia).[2]

Instead, the district court second-guessed the necessity of DOJ's request for the sole reason that a citizenship question had not been on the short form since the VRA's enactment in 1965. Pet. App. 295a-297a. But under that logic, the Secretary could never ask *any* additional questions on the census to aid VRA enforcement efforts, no matter how helpful they might be. The APA does not ossify the census form or curtail the Secretary's discretion in that manner. Just because DOJ and the States have managed to overcome the limitations of ACS citizenship data for VRA enforcement and redistricting thus far does not mean that the APA, the Census Act, or the Constitution *requires* the perpetuation of that state of affairs.

Finally, the district court criticized the Secretary for supposedly failing to consider "the effect of the Census Bureau's confidentiality obligations and disclosure avoidance practices on the fitness of decennial census citizenship data for DOJ's stated purposes." Pet. App. 297a. To avoid disclosing personally identifiable census data, see 13 U.S.C. 9(a), the Bureau uses statistical techniques to anonymize the data, and the court speculated that these techniques would prevent the generation of accurate census-block-level citizenship data for

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[2] A link to this portion of the administrative record, which is publicly available, is in 18-cv-2921 D. Ct. Doc. 173 (June 8, 2018).

DOJ. See Pet. App. 298a-299a. But the Secretary plainly was aware of the agency's disclosure-avoidance obligations. See, *e.g.*, *id.* at 556a (recognizing that "census responses by law may only be used anonymously and for statistical purposes"), 562a (remarking that individual census responses "are protected by law"). And nothing in the administrative record even hints that anonymization will be an obstacle to providing DOJ the citizenship data it requested. To the contrary, as the Bureau explained, anonymization is designed to shield "person-level microdata," J.A. 135—not to prevent the generation of usable census-block-level citizenship data.

With nothing in the administrative record to support its speculation, the district court instead relied on extra-record evidence. See Pet. App. 298a-299a (citing trial transcripts and deposition excerpts). That was improper. See pp. 55-56, *infra*. It also was incorrect: the same expert whose testimony the court relied on (Pet. App. 298a-299a) and found "credible and persuasive," *id.* at 293a n.68, testified—in response to a question from the court itself—that the Bureau's disclosure-avoidance practices will *not* prevent it from providing DOJ with "accurate citizen voting-age population for within [a block-level] area." 11/13/2018 Tr. 1037 (18-cv-2921 D. Ct. Doc. 560); see 11/14/2018 Tr. 1245 (18-cv-2921 D. Ct. Doc. 562) (opining that "disclosure avoidance at the block level" would not "impair" DOJ's ability to use the data).

c. The district court further erred in concluding that the Secretary's decision was arbitrary and capricious because "it represented a dramatic departure from the standards and practices that have long governed administration of the census." Pet. App. 300a. Specifically,

the court determined that the Secretary violated OMB statistical directives and the Bureau's internal statistical quality standards. *Id.* at 302a-310a. As an initial matter, the court's conclusion is wrong on its face: questions about citizenship or place of birth (or both) have a long pedigree on the decennial census dating back to 1820 and have been part of the ACS every year since its inception in 2005, so reinstating a citizenship question to the 2020 decennial census is not a "dramatic departure" from census "practices" at all. If anything, it represents a return to the traditional status quo. Regardless, the statistical standards the district court cited do not provide judicially manageable standards and the Secretary did not run afoul of them anyway.

The OMB directives provide no judicially manageable standards because they state only that governmental data-collection efforts should "achieve[] the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost," Pet. App. 303a (citation omitted), and leave to the relevant agency the task of designing and implementing specific "policies, practices, and procedures" based on the "particular data needs, forms of data, and information technology" required or available at the time, 79 Fed. Reg. 71,610, 71,613 (Dec. 2, 2014). A court could not possibly police compliance with the directives without both second-guessing the agency's judgment about what constitutes the "best balance" of the competing factors and micromanaging the agency's choices of policies and practices to achieve that balance. And even if it could, the Secretary did not arbitrarily depart from those directives here. As discussed earlier, pp. 28-35, *supra*, the Secretary reasonably concluded

that combining existing citizenship data in federal administrative records with new citizenship data from the decennial census would provide the most complete and accurate data to DOJ at an acceptable cost. See Pet. App. 548a-562a. That conclusion was amply supported by the administrative record and well within the Secretary's "virtually unlimited discretion" to conduct the decennial census. *Wisconsin*, 517 U.S. at 19.

Similarly flawed was the district court's conclusion that the Secretary unreasonably deviated from the Bureau's internal statistical quality standards by failing to pretest the citizenship question without first obtaining a waiver. Pet. App. 305a-306a. The Bureau's pretesting standards do not and cannot bind *the Secretary*, so it does not matter whether *the Bureau* applied for a waiver. See *id.* at 305a. As the Senate-confirmed head of the agency, the Secretary need not seek a waiver from his subordinates. Besides, the standards do not require pretesting when the question has "performed adequately in another survey." *Ibid.* (citation omitted). Here, the Census Bureau informed the Secretary that pretesting the citizenship question was unnecessary: "Since the question is already asked on the [ACS], we would accept the cognitive research and questionnaire testing from the ACS instead of independently retesting the citizenship question." AR 1279. It was plainly not arbitrary and capricious for the Secretary to rely on that expert assessment, particularly given the long history of the question on the decennial census and the ACS.

D. The Secretary's Stated Rationale Cannot Be Set Aside As Pretextual

The district court found that the Secretary's decision flunked APA review for the further reason that his

stated rationale was allegedly "pretextual"—by which the court meant "the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts." Pet. App. 311a. Without identifying what that "real reason" supposedly was, the court concluded that the Secretary "made the decision to add a citizenship question well before he received DOJ's request and for reasons unrelated to the VRA." *Id.* at 313a.

The district court's reasoning defies fundamental principles governing APA review of agency action. This Court has long recognized that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). In part for that reason, this Court has "made it abundantly clear" that APA review must focus only on the "contemporaneous explanation of the agency decision" that the agency chooses to rest upon, *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978), and that explanation must be upheld if the record reveals a "rational" basis supporting it. *State Farm*, 463 U.S. at 42-43. As explained above, the Secretary's decision was amply supported by the administrative record and his memorandum is of more than sufficient "clarity" that the grounds on which he rested his decision "may reasonably be discerned." *Id.* at 43 (citation omitted); *Home Builders*, 551 U.S. at 658.

The district court erred in concluding that, notwithstanding the Secretary's rational contemporaneous explanation, his decision must be set aside because he had additional reasons for pursuing it. Agency action does not fail APA review merely because, as is often the case,

the agency decisionmaker had unstated reasons for supporting a policy decision in addition to a stated reason that is both rational and supported by the record. See *Jagers* v. *Federal Crop Ins. Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014) (rejecting argument that "the agency's subjective desire to reach a particular result must necessarily invalidate the result, regardless of the objective evidence supporting the agency's conclusion"). It "would eviscerate the proper evolution of policymaking were [courts] to disqualify every administrator who has opinions on the correct course of his agency's future actions." *Air Transp. Ass'n of Am., Inc.* v. *National Mediation Bd.*, 663 F.3d 476, 488 (D.C. Cir. 2011); see *Jagers*, 758 F.3d at 1185. Accordingly, to set aside an agency action that is supported by a rational justification, a court must find that the decisionmaker did not believe the stated grounds on which he ultimately based his decision, irreversibly prejudged the decision, or otherwise acted on a legally forbidden basis. See *Mississippi Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 183 (D.C. Cir. 2015) (per curiam); *Jagers*, 758 F.3d at 1185; *Air Transp. Ass'n*, 663 F.3d at 488.

The district court resisted application of this legal standard by attempting to distinguish this case on its facts. The Secretary's decision here, the court surmised, was not "supported by 'objective scientific evidence'" and might have been subject to "improper 'external political pressures.'" Pet. App. 320a (citation omitted). But deferential APA review is not limited to agency decisions resting on "objective scientific evidence," and the court cited no contrary authority. Nor is there any evidence here of "improper external political pressures"; at most, the court found that the Secre-

tary communicated with various stakeholders, including a White House official, before making his decision. See *id.* at 77a, 79a. But such communications are perfectly commonplace and, outside certain narrow circumstances not applicable here (such as in on-the-record hearings), are not grounds to set aside agency action under the APA. *Sierra Club* v. *Costle*, 657 F.2d 298, 408-410 (D.C. Cir. 1981).

In the alternative, the district court found that the Secretary did not in fact believe his stated rationale for reinstating a citizenship question. Pet. App. 320a. Yet the court cited no evidence (much less "solid" evidence, *ibid.*) that the Secretary disbelieved DOJ's letter and, instead, secretly thought that reinstating the citizenship question to the census would *not* be useful for VRA enforcement. The court's finding thus has no basis in the record, let alone the compelling support necessary for a court to overcome the presumption of regularity and level a charge of deceit against a Cabinet Secretary who has taken an oath to obey the law. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996).

Likewise, the record does not support the district court's conclusion that the Secretary acted with an "unalterably closed mind." Pet. App. 318a (citation omitted). The mere fact that the Secretary was inclined towards a certain policy position and reached out to DOJ to ask if it would support that policy does not establish that he was unwilling to rationally consider counterarguments. See *Jagers*, 758 F.3d at 1185 ("subjective hope" that factfinding would support a desired outcome does not "demonstrate improper bias on the part of agency decisionmakers"). "[T]here's nothing unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support

from other agencies to bolster his views, [and] disagreeing with staff." *In re Department of Commerce*, 139 S. Ct. 16, 17 (2018) (opinion of Gorsuch, J.).

Nothing in the Secretary's memoranda (or any other document) suggests that the Secretary would have asserted the VRA-enforcement rationale had DOJ disagreed or, conversely, that DOJ's request made the Secretary's decision a *fait accompli*. And the court's "extraordinary" accusation that a Cabinet Secretary intentionally misled Congress, the judiciary, and the public about his decisionmaking process is unfounded. *Department of Commerce*, 139 S. Ct. at 17 (opinion of Gorsuch, J.). In deeming the Secretary's explanation of his decisionmaking process "false or misleading," and in supposedly cataloging "the many ways in which Secretary Ross and his aides sought to conceal aspects of the process," Pet. App. 314a, the court strained to construe the Secretary's remarks and actions in the most uncharitable manner possible, in defiance of the presumption of regularity that courts must apply to Executive Branch action. *Armstrong*, 517 U.S. at 464.

For example, as evidence that the Secretary purportedly concealed that he had asked DOJ if it would request that a citizenship question be reinstated, the district court cited the Secretary's March 20, 2018 statement to Congress that the Commerce Department was "responding 'solely' to the Department of Justice's request." Pet. App. 128a; see *id.* at 126a-129a. But that statement was in response to questions asking whether the Commerce Department acted in response to requests from political campaigns or parties. See 2018 WLNR 8815056.[3] Secretary Ross's disavowal cannot

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[3] *Hearing to Consider FY2019 Budget Request for Department of Commerce Programs Before the Subcomm. on Commerce, Justice,*

reasonably be interpreted as additionally claiming that he had not previously considered the issue or spoken to others within the Administration about it. The court's other examples are of a piece; viewed in context, none is false or misleading. See 18-557 Gov't Br. at 25-37 (refuting each example). In concluding otherwise, the court plucked snippets of dialogue out of context, see Pet. App. 124a-129a, and turned the presumption of regularity on its head by viewing each of the Secretary's statements and acts in the worst possible light, rather than the best. *Armstrong*, 517 U.S. at 464.

E. The Secretary's Decision Was In Accordance With Law

The district court erroneously concluded that reinstating the citizenship question to the decennial census was "not in accordance with law," 5 U.S.C. 706(2)(A), because the Secretary purportedly violated two provisions of the Census Act: 13 U.S.C. 6(c) and 141(f). Pet. App. 261a-284a.

1. Section 6(c) of the Census Act does not support setting aside the Secretary's decision

The district court erroneously concluded (Pet. App. 261a-272a) that the Secretary violated Section 6(c) of the Census Act. That provision states: "To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from [administrative records] instead of conducting direct inquiries." 13 U.S.C. 6(c).

At the threshold, Section 6(c) contains no judicially manageable standards to evaluate compliance with its

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Science, and Related Agencies of the House Comm. on Appropriations, 115th Cong., 2d Sess. (2018), available at 2018 WLNR 8815056.

terms. The district court's conclusion that administrative records alone were sufficient to satisfy the "kind, timeliness, quality and scope" of citizenship data the Secretary required, 13 U.S.C. 6(c), rests on the premise that the Secretary should have chosen to fill in the undisputed gaps in that data—*i.e.*, the tens of millions of individuals whose citizenship information cannot be linked to administrative records—by imputation and statistical techniques, rather than by reinstating a longstanding citizenship question to the decennial census. See Pet. App. 269a-270a. But Section 6(c) does not supply any standard by which a court could evaluate that policy choice. To be sure, Section 6(c) might require the Secretary to use administrative records when they are readily available and comprehensive. Yet nothing in that provision purports to curtail the Secretary's discretion to make "direct inquiries" when, as here, the data in those records is concededly incomplete, or to provide any standards by which a court could determine when a dataset is incomplete enough to permit direct inquiries.

It is particularly odd to conclude, as the district court did, that Section 6(c) curtails the Secretary's discretion to ask *a citizenship question*. When Section 6(c) was added to the Census Act, see Act of Oct. 17, 1976, Pub. L. No. 94-521, § 5(a), 90 Stat. 2460, a citizenship question had long been included on the decennial census for some or all of the population, even though administrative records were available for the Secretary's use, see Act of Aug. 28, 1957, Pub. L. No. 85-207, § 3, 71 Stat. 481 (enacting 13 U.S.C. 6(a) and (b)). In enacting Section 6(c), Congress gave no hint that it disapproved of the citizenship (or any other demographic) question or wanted to eliminate it from the census questionnaire in

favor of relying solely on those administrative records, with imputation to fill in the gaps. Yet taken to its logical conclusion, the court's contrary reasoning likely would mean that *every* demographic question on the decennial census violates Section 6(c), for the Secretary can always use administrative records to collect data about age, sex, race, or Hispanic origin and then fill in any gaps in that data through modeling or imputation rather than by asking questions on the census. Even the court seemed to recognize that its reasoning in this way proved too much. Pet. App. 271a.

Regardless, the Secretary's decision fully complied with Section 6(c). Even if acquired and used "[t]o the maximum extent possible," 13 U.S.C. 6(c), federal administrative records do not contain citizenship data for a large swath of residents—35 million people, according to the Bureau's estimates. See Pet. App. 55a-56a. Given the "kind, timeliness, quality and scope" of citizenship data the Secretary understood DOJ to be requesting for its VRA enforcement efforts, 13 U.S.C. 6(c), the Secretary reasonably determined that supplementing the data in the administrative records with data from the decennial census would "provide DOJ with the most complete and accurate [citizenship] data in response to its request," Pet. App. 556a. That is more than sufficient to satisfy Section 6(c).

The district court's contrary conclusion rested on the mistaken belief that combining citizenship data from administrative records with that from the decennial census "would produce *less accurate citizenship data* than" using the administrative records alone. Pet. App. 270a. For the reasons already discussed, see pp. 31-35, *supra*, that belief was erroneous; in fact census citizen-

ship data would improve both completeness and accuracy. The court also was mistaken to suggest that Section 6(c) prohibits asking demographic questions on the census unless the demographic information is "*required*—as opposed to merely desired." Pet. App. 267a. Demographic questions of all sorts have been present on every decennial census in the Nation's history, see *id.* at 16a-20a, and, as noted, Congress has never suggested that it disapproves.

Finally, the district court observed that the Secretary's decisional memorandum "nowhere mentions, considers, or analyzes his statutory obligation" under Section 6(c), and "[a]gency action taken in ignorance of applicable law is arbitrary and capricious." Pet. App. 266a. But this Court has never held that an agency's mere failure to cite a statutory provision, even while providing an explanation demonstrating that the provision has been satisfied, renders the agency action arbitrary and capricious under the APA. Nor do the lower-court cases on which the district court relied (*id.* at 266a-267a) so hold; instead, those cases merely reiterate the unremarkable principle that an agency may not "apply the wrong law," *Caring Hearts Pers. Home Servs., Inc.* v. *Burwell*, 824 F.3d 968, 970 (10th Cir. 2016), or act in contravention of the "plain language of the [relevant] statute," *Friends of Richards-Gebaur Airport* v. *FAA*, 251 F.3d 1178, 1195 (8th Cir. 2001), cert. denied, 535 U.S. 927 (2002).

2. Section 141(f) of the Census Act does not support setting aside the Secretary's decision

The district court further erred in concluding (Pet. App. 272a-284a) that the Secretary violated 13 U.S.C. 141(f). That provision establishes a congressional re-

porting scheme for the census questionnaire. Paragraph (1) requires the Secretary to submit a report to Congress containing "the subjects" to be included on the census at least three years before the census date. 13 U.S.C. 141(f)(1). Paragraph (2) requires the Secretary to submit a report to Congress containing the "questions" to be included not less than two years before the census date. 13 U.S.C. 141(f)(2). Paragraph (3) then provides that, "after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate" modifying the subjects or questions previously submitted, the Secretary shall submit a report to Congress identifying the modified subjects or questions. 13 U.S.C. 141(f)(3).

It is undisputed that the Secretary timely submitted the required Section 141(f)(1) and (2) reports to Congress in March 2017 and March 2018, respectively. Pet. App. 274a. It also is undisputed that the Secretary informed Congress he intended to include a citizenship question on the census in his (f)(2) report. *Ibid.* The district court nonetheless concluded that the Secretary violated Section 141(f) because the earlier (f)(1) report did not include citizenship as a "subject." *Id.* at 275a-276a. That was erroneous for several reasons.

a. Most important, if the Secretary's reports were deficient, it is a matter for Congress to address—not the courts. As the D.C. Circuit has explained, the adequacy of "[e]xecutive responses to congressional reporting requirements" generally is not judicially reviewable because "it is most logically for the recipient of the report to make that judgment and take what it deems to be the appropriate action." *Natural Res. Def. Council, Inc.* v. *Hodel*, 865 F.2d 288, 318-319 (1988). Other lower

courts agree. *E.g.*, *Guerrero* v. *Clinton*, 157 F.3d 1190, 1197 (9th Cir. 1998) (adequacy of statutorily required report to Congress from the Office of Insular Affairs not judicially reviewable); *Taylor Bay Protective Ass'n* v. *Administrator*, 884 F.2d 1073, 1080 (8th Cir. 1989) (Army Corps of Engineers flood-control report); *United States* v. *White*, 869 F.2d 822, 829 (5th Cir. 1989) (Sentencing Commission report). The district court cited no authority for its contrary approach.

The apparent unanimity is not surprising. Reporting requirements are "by [their] nature * * * singularly committed to *congressional* discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements." *Hodel*, 865 F.2d at 318. Thus, "in the absence of a congressional directive for judicial review of claims by non-congressional parties, th[e] issue [is] quintessentially within the province of the political branches to resolve as part of their ongoing relationships." *Id.* at 319.

Indeed, judicial review of the Secretary's compliance with Section 141(f)'s reporting requirements is neither "necessary [n]or advisable." *Taylor Bay*, 884 F.2d at 1080. The Secretary informed Congress of his intent to include a citizenship question on the census in March 2018, and Congress has questioned the Secretary about his decision in public hearings on several occasions since. See Pet. App. 71a-73a; 18-557 Gov't Br. at 25-31 (describing some of the testimony). Congress is thus well aware of the Secretary's intent to add a citizenship question to the census and could enact legislation if it disapproved.

The district court purported to find "two critical distinctions" that would make the congressional reporting

requirements in Section 141(f) judicially reviewable. Pet. App. 280a. Neither is availing.

First, the court reasoned that the Section 141(f) reports are "conditions precedent to some other agency action subject to judicial review." Pet. App. 280a. That is incorrect. Neither Section 141(f) nor any other provision of the Census Act conditions the Secretary's exercise of discretion to ask a particular question on the adequacy or even the submission of the Secretary's reports to Congress. Congress knows how to condition agency action on the filing of a report, *e.g.*, 10 U.S.C. 2687(b); 25 U.S.C. 1631(b)(1); 50 U.S.C. 1703—yet did not do so in the Census Act. The Section 141(f) informational reports are indistinguishable in that respect from the informational reports in *Hodel* and other cases. See, *e.g.*, 865 F.2d at 316 n.27.

Second, the district court asserted that even if the contents of the Section 141(f) reports are not judicially reviewable, here the Secretary "failed entirely" to submit an (f)(3) report containing an updated list of the "subjects" to be included on the census. Pet. App. 282a (citation omitted). But that is just another way of subjecting the contents of the informational reports to judicial review; for the only way to conclude that the Secretary was required to (but then did not) file an (f)(3) report is to find that the (f)(1) report did not adequately disclose the subjects to be asked on the census. See *Hodel*, 865 F.2d at 318; *Guerrero*, 157 F.3d at 1193. It also is just another way of saying that the reports are preconditions to the Secretary's exercise of discretion to determine the contents of the census form; otherwise, there would be no warrant to enjoin the asking of the citizenship question as a remedy for failing to file the report.

b. In any event, even if the issue were judicially reviewable, the Secretary complied with Section 141(f). He timely submitted the (f)(1) and (f)(2) reports, and though the (f)(1) report did not identify citizenship as a *subject* to be asked, the (f)(2) report identified the citizenship *question*. As a result, that report effectively served as an (f)(3) report modifying the earlier (f)(1) report—for by identifying citizenship as a *question*, the Secretary necessarily alerted Congress that citizenship also would be a *subject*. No reasonable reader could conclude otherwise.

The district court rejected that straightforward observation for two reasons, neither of which has merit. First, the court thought that Section 141(f)(3) "conditions the belated addition of a new subject or question on a 'finding' by the Secretary that 'new circumstances exist'" and, in the court's view, the Secretary did not make such a "finding." Pet. App. 275a-276a (brackets and citation omitted). That is incorrect. Under the plain text of Section 141(f)(3), the Secretary's report need not contain his "findings"; it need only contain his "determination of the subjects, types of information, or questions as proposed to be modified." 13 U.S.C. 141(f)(3). The Secretary's report here indisputably does that. And even if the Secretary were required to describe his findings of "new circumstances" to Congress, he did so in his decisional memorandum, which explains that DOJ's formal request arrived in December 2017, many months after the initial (f)(1) report. See Pet. App. 548a.

Second, the district court thought that "if the Section 141(f)(2) report could satisfy Section 141(f)(3) when the Section 141(f)(1) report was to be modified," it would render "Section 141(f)(3)'s reference to 'paragraph (1)

. . . of this subsection' superfluous." Pet. App. 276a. That, too, is incorrect. Section 141(f)(3) states that the Secretary may submit his additional report(s) at any time "after submission of a report under paragraph (1) *or* (2) of this subsection." 13 U.S.C. 141(f)(3) (emphasis added). The disjunctive reference to "paragraph (1)" is not superfluous; it makes clear that if the Secretary needs to update the "subjects" in an earlier (f)(1) report, he need not wait until after he has submitted his (f)(2) report; he may submit an (f)(3) report any time after submitting the (f)(1) report. And of course nothing in Section 141(f) prevents the Secretary from submitting such an (f)(3) report at the same time as—indeed, in the same document as—his (f)(2) report. That is precisely what the Secretary in effect did here. The court's determination that doing so was improper not only lacks a basis in the statutory text, but elevates form over substance, enjoining the Secretary from asking the citizenship question simply because he submitted his Section 141(f)(2) and (f)(3) reports, which indisputably provided Congress with all requisite information, in one document instead of two.

F. Respondents' Constitutional Claims Do Not Provide Alternative Grounds For Affirmance

The district court rejected respondents' constitutional claims under the Enumeration Clause and the equal-protection component of the Fifth Amendment's Due Process Clause. See Pet. App. 321a-335a, 408a-424a. Neither provides an alternative basis to affirm the judgment below. Although respondents did not raise either claim as an alternative basis to affirm in their briefs in opposition, other plaintiffs have brought similar claims in federal courts in California and Mary-

land, see p. 5 n.1, *supra*, and the district courts overseeing that litigation have declined the government's requests to stay those cases following this Court's grant of certiorari before judgment here. The government therefore addresses the constitutional claims in the event respondents or other district courts attempt to rely on those claims as a basis for enjoining reinstatement of the citizenship question.

As the district court correctly observed, questions "unrelated to the 'actual Enumeration'" have a long history on the decennial census, Pet. App. 413a, including "a nearly unbroken practice" over "two centuries" of "including a question concerning citizenship on the census," *id.* at 418a; see *id.* at 417a-419a. In light of that history and the Secretary's "virtually unlimited discretion" to conduct the census, *Wisconsin*, 517 U.S. at 19, the court rejected respondents' contention that "each and every question on the census must bear a 'reasonable relationship' to the goal of an actual enumeration." Pet. App. 420a. If respondents' position were correct, the court observed, "each and every census—from the Founding through the present—has been conducted in violation of the Enumeration Clause. That would, of course, be absurd." *Id.* at 421a-422a.

The district court also correctly rejected respondents' equal-protection claim because neither the administrative record nor the extensive "extra-record discovery" "reveal[s] discriminatory animus on the part of Secretary Ross." Pet. App. 332a. Accordingly, respondents "failed to prove * * * that a discriminatory purpose motivated [the] decision to reinstate the citizenship question [to] the 2020 census questionnaire." *Id.* at 334a. Indeed, respondents "all but admit[ted]" as much. *Id.* at 332a.

II. THE DISTRICT COURT ERRED IN AUTHORIZING DISCOVERY BEYOND THE ADMINISTRATIVE RECORD TO PROBE THE SECRETARY'S MENTAL PROCESSES

The district court erred in allowing and considering extra-record discovery. In evaluating a challenge to agency action under the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); see *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). A narrow exception to this rule exists if there is "a strong showing of bad faith or improper behavior" on the part of the agency decisionmakers, *Overton Park*, 401 U.S. at 420, but respondents did not make that requisite showing here.

In concluding otherwise, the district court relied on five alleged circumstances that it thought demonstrated the Secretary's bad faith: (1) the Secretary did not reveal his true reasons for wanting to reinstate the citizenship question; (2) he made up his mind to add the question before reaching out to DOJ; (3) he overruled his subordinates; (4) he deviated from standard operating procedures; and (5) his reasons were pretextual because DOJ had never previously suggested that it needed census citizenship data for VRA enforcement. Pet. App. 524a-528a; see *id.* at 443a-444a.

As discussed above, these are the same findings that the district court used to bolster its conclusions that the Secretary's decision was arbitrary and capricious and pretextual. See pp. 36-45, *supra*. Accordingly, they are unavailing for the same reasons. See *ibid.*; see also 18-557 Gov't Br. at 18-37. Because the Secretary's decision was neither pretextual nor arbitrary and capricious, *a fortiori* it was not made in bad faith.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. I, § 2, Cl. 3 provides in pertinent part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * * . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

* * * * *

2. 5 U.S.C. 706 provides:

> **Scope of review**
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 13 U.S.C. 2 provides:

Bureau of the Census

The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.

4. 13 U.S.C. 4 provides:

Functions of Secretary; regulations; delegation

The Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties and the authority to issue such rules and regulations to such officers and

employees of the Department of Commerce as he may designate.

5. 13 U.S.C. 5 provides:

Questionnaires; number, form, and scope of inquiries

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

6. 13 U.S.C. 6 provides:

Information from other Federal departments and agencies; acquisition of reports from other governmental and private sources

(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to

in subsection (a) or (b) of this section instead of conducting direct inquiries.

7. 13 U.S.C. 141 provides in pertinent part:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

* * * * *

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new

circumstances exist which necessitate that the subjects; types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

* * * * *

8. 13 U.S.C. 221 provides:

Refusal or neglect to answer questions; false answers

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

(b) Whoever, when answering questions described in subsection (a) of this section, and under the conditions or circumstances described in such subsection, willfully gives any answer that is false, shall be fined not more than $500.

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.